



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

REDACTED VERSION

**Matter of:** BNF Technologies, Inc.

**File:** B-254953.3

**Date:** March 14, 1994

Craig S. King, Esq., and John J. O'Brien, Esq., Arent Fox, for the protester.  
Richard L. Mocrhouse, Esq., Dunnells & Duvall, for Princeton Economic Research, Inc., an interested party.  
Ronald E. Cone and Robert Walsh, Department of Energy, for the agency.  
David R. Kohler, Esq., and Katherine C. Power, Esq., Small Business Administration, for the agency.  
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Agency conducted an unreasonable probable cost analysis when it upwardly adjusted the protester's overhead and general and administrative rates to reflect the protester's historical rates without properly considering that the protester's proposal contained a firm legal commitment to cap these rates.

### DECISION

BNF Technologies, Inc. protests the award of a contract to Princeton Economic Research, Inc. under request for proposals (RFP) No. DE-RP01-92CE35060, issued by the United States Department of Energy (DOE), for management and administrative support services. The procurement was conducted competitively pursuant to section 8(a) of the

The decision issued on March 14, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. IV 1992).<sup>1</sup>

We sustain the protest.

DOE issued this RFP on September 8, 1992, to procure management and administrative support services for the DOE Office of Utility Technology's (UT) research and development activities under a cost-plus-fixed-fee, level-of-effort contract. The RFP required the contractor to provide assistance to the UT program offices, and the Deputy Assistant Secretary for UT and support staff. The RFP, issued as a total section 8(a) set-aside, contained a local-buy requirement, which limited competition to section 8(a) qualified firms located within the SBA Region III serviced by the SBA Washington, D.C., office. The RFP called for an estimated 150,660 direct productive labor hours (DPLH) within a 36-month base period, with two 12-month options, each for an estimated 50,220 DPLH. The RFP also expressly provided for offerors to propose ceilings on indirect cost rates, whereby the contractor would have to bear all costs in excess of the ceiling.

Section M of the RFP provided for the award to be made to the responsible offeror whose offer, conforming to the RFP, was considered most advantageous to the government. To this effect, the RFP stated that technical merit was more important than cost, but noted that if after the evaluation two or more proposals remained in the competitive range, "evaluated probable cost to the government may be the deciding factor for selection, depending on whether the [highest rated technical] proposal is determined to be worth the cost differential." The technical proposals were to be point scored under a 1,000-point scale under the following criteria: (1) technical approach, (2) organization and management capabilities, (3) key personnel qualifications, and (4) corporate qualifications. The cost proposals were not to be point scored, but were to be evaluated to determine probable cost to the government. In addition, an unrealistic cost proposal could be taken into account in

---

<sup>1</sup>Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1993) provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns. We review competitive 8(a) procurements to ensure that they conform to applicable federal procurement regulations. See New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

assessing an offeror's understanding of the project under the technical evaluation.

By the amended closing date of October 26, DOE received nine proposals, which included proposals from BNF, the incumbent contractor, and Princeton. The technical and the cost proposals were evaluated by a five member technical evaluation committee (TEC). On the basis of the technical evaluation, the TEC established a competitive range consisting of the [DELETED] highest ranked technical proposals, including those of BNF and Princeton. After establishing the competitive range, the TEC conducted a probable cost analysis of each competitive range proposal, with the assistance of the Defense Contract Audit Agency (DCAA).

Following technical discussions, DOE requested revised technical and cost proposals by April 5, 1993. The TEC ranked Princeton's revised technical proposal the highest with a score of [DELETED]. BNF's technical proposal was ranked [DELETED] with a score of [DELETED]. Princeton's cost proposal of [DELETED] was assessed as having the [DELETED] probable cost of [DELETED]. BNF's cost proposal of [DELETED] had a probable cost of [DELETED].

After conducting discussions with the competitive range offerors, DOE requested best and final offers (BAFO), including revised technical and cost proposals by August 5. In the BAFO request, DOE warned offerors that if they offered low indirect rates, they should insert appropriate ceilings as provided in the RFP or the probable cost would be assessed at the offerors' audited rates.

In its BAFO, BNF significantly reduced its cost proposal to [DELETED]. In so doing, BNF expressly committed to an overhead ceiling rate of [DELETED] percent and a general and administrative (G&A) ceiling rate of [DELETED] percent in accordance with the clause included in the RFP. In determining the probable cost of BNF's proposal, DOE made a number of upward adjustments. For example, notwithstanding BNF's proposed ceilings, DOE recalculated BNF's overhead rate to [DELETED] percent (BNF's historical rate according to DCAA), which increased the overhead cost by [DELETED], and recalculated BNF's G&A rate at [DELETED] percent (the rate recommended by DCAA), which increased this cost by [DELETED]. DOE also increased BNF's direct labor costs by [DELETED] and BNF's other direct costs (ODC) and travel by [DELETED]. Finally, DOE increased BNF's subcontractor costs by [DELETED]. DOE determined BNF's proposal's probable cost to be [DELETED], which was the lowest of the competitive range proposals. Princeton had a proposed cost of [DELETED] and a probable cost of [DELETED].

Princeton's BAFO was awarded the high technical score of [DELETED] points while BNF's proposal had the lowest score of [DELETED]. In the source selection statement, DOE determined that Princeton's technical proposal was [DELETED] to the other competitive range proposals as evidenced by the point scores.<sup>2</sup> Since DOE found that the probable cost of Princeton's proposal and BNF's proposal were [DELETED] Princeton was selected for award [DELETED].

On September 14, the SBA approved the award. BNF filed this protest against the award on September 17, which it amended on September 24 and November 1. On September 23, DOE made a determination that it was in the government's best interest to proceed with performance of the contract.

BNF protests that the agency improperly recalculated its overhead and G&A above its proposed ceilings. BNF also asserts that DOE's other cost adjustments are unsupported, and that had DOE not improperly increased the probable cost of its proposal, the agency would not have been able to reasonably conclude that Princeton's technical advantage justified award at its higher cost.

When agencies evaluate proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed cost represents what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183, aff'd, American Mgmt. Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510 (1991), 91-1 CPD ¶ 492.

DOE contends that the wide degree of variance between BNF's proposed capped overhead and G&A rates and the historical rates approved by DCAA ([DELETED] percent as compared to [DELETED] percent overhead rates and [DELETED] percent as compared to [DELETED] percent G&A rates) permitted the agency to project the probable costs of these items to the historical rates. DOE also supports this adjustment by referencing BNF's alleged reluctance to agree to this

---

<sup>2</sup>[DELETED]

overhead ceiling in negotiations for the last extension of the incumbent contract unless other contract work materialized for BNF and DOE's awareness that BNF had been unsuccessful in competing for a recent National Aeronautics and Space Administration contract.

As a general rule, the maxim that the government bears the risk of cost overruns in the administration of a cost reimbursement contract is reversed when a contractor agrees to a cap or ceiling on its reimbursement for a particular category or type of work. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202. An offeror who proposes a cap has shifted the risk of overruns away from the government, such that upward adjustments to capped costs are improper, unless the caps are ineffective or can be circumvented. Id.; Halifax Tech. Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30.

Here, the record does not support the propriety of DOE's upward adjustments to the capped indirect cost items. As requested by DOE, BNF's BAFO contained the appropriate contract provision committing BNF to bear the cost of any expenses in excess of these indirect rates and there is no suggestion that BNF could evade or circumvent the capped rates. The DCAA suggested and essentially approved of the reasonableness of the proposed capped rates in advising DOE:

"[w]e believe the proposed overhead rate may be potentially understated based on the contractor's historical experience. . . . [DELETED]. Accordingly, the proposed rate may be understated. However, the contractor has indicated a commitment to controlling overhead rates to achieve the proposed level of overhead rates and costs. Furthermore, the contractor indicated a willingness to negotiate a ceiling rate for overhead near the proposed rate. As such, we did not recommend an upward adjustment to reflect historical experience, but our acceptance of the proposed overhead cost is predicated on the negotiation of a ceiling rate on overhead."

DOE has provided no valid reason for not following DCAA's advice in this matter. While DOE admits suggesting to BNF in its BAFO request that a ceiling on its indirect cost rates be considered if low indirect rates were continued to be proposed, DOE relies upon the statement in the BAFO request that "the degree of variance" between ceiling rates and proposed rates could be considered in the probable cost analysis to justify the upward cost adjustment in the indirect costs. We fail to understand this DOE explanation since BNF's proposed rates and ceiling rates coincided. In any event, given that BNF unequivocally agreed to and was

legally bound to its ceiling rates, DOE had no basis to upwardly adjust these rates. For the same reason, DOE's reliance on BNF's understandable reluctance to agree to an indirect cost ceiling on a 3-month contract extension unless other work was obtained and DOE's knowledge that BNF was unsuccessful in competing for another contract provide no basis to adjust BNF's rates beyond the ceilings. It appears that the real concern with BNF's ceilings was DOE's doubts about BNF's financial viability if the capped rates turned out to be too low. Not only is the record devoid of reasonable support for DOE's concerns, but such concerns relate to BNF's responsibility, which is a matter for the SBA's consideration, and therefore not within the scope of a probable cost analysis. See Vitro Corp., supra; Alamo Contracting Enters., Inc., B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358.

Our review also shows that DOE's probable cost analysis apparently miscalculated BNF's proposal with regard to direct labor costs. In this regard, we note that the premise stated by DOE, upon which the upward adjustments to BNF's direct labor costs were made, was inaccurate. That is, while DOE's contemporaneous documentation stated the adjustment was made because it found that [DELETED],<sup>3</sup> While DOE, in its reports in response to the protests, advances additional, possibly valid reasons for making some sort of an upward adjustment to BNF's direct labor costs,<sup>4</sup> the quantum of such an adjustment is questionable given DOE's apparent misunderstanding of BNF's proposal. Since, as indicated above, the probable cost analysis is otherwise flawed, DOE should reevaluate these costs.<sup>5</sup>

Another area of DOE's probable cost analysis that reflects an unreasonable upward cost adjustment involves the evaluation of the protester's travel costs. The RFP required travel to be performed under the contract at the rate of six trips per year, two people per trip, each trip lasting 2 days. To meet this requirement, BNF proposed travel at a cost of [DELETED]. DOE increased these costs to [DELETED]. In reporting on the protest, DOE acknowledges

---

<sup>3</sup>[DELETED]

<sup>4</sup>DOE states that the overall salary structure and labor mix may not allow the qualified staff to be retained, such that performance problems under the contract may result.

<sup>5</sup>We also note that DOE increased the escalation rate of BNF from [DELETED] to a "Data Resource Index" escalation rate for the entire period. While there may be good reasons for this adjustment, as noted previously, BNF's BAFO stated [DELETED].

that the travel cost projections were overstated by [DELETED], but that BNF's costs were considered "unrealistically low." We are not persuaded that DOE reasonably increased these costs because Princeton's proposed travel costs were [DELETED], which DOE accepted and considered reasonable in evaluating Princeton's proposal. Since the travel requirements were set by the RFP and both contractors were located in the Washington, D.C., area, we find no support for DOE's unequal evaluation of the travel costs.

As indicated above, we find the probable cost analysis of BNF's proposal wanting for a variety of reasons.<sup>6</sup> From our review, it appears that BNF's probable costs should be significantly lower than evaluated,<sup>7</sup> such that the source selection [DELETED] without consideration of BNF's real probable cost advantage cannot be said to be reasonably based. See Tennessee Wholesale Drug Co., Inc., B-243018 et al., June 28, 1991, 91-2 CPD ¶ 9.

We recommend that DOE perform a new probable cost analysis of the proposals in accordance with this decision, obtaining proposal revisions if necessary. DOE should then make a new source selection decision based upon the revised probable cost analysis. If BNF is determined to offer the best value to the government under the RFP criteria, DOE should terminate the award to Princeton and make award to BNF. We also find that BNF is entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). The

---

<sup>6</sup>BNF has also challenged the significant adjustments made by DOE to BNF's ODCs and subcontractor costs. We are uncertain as to the reasonableness of these adjustments in view of the other flaws evident in the probable cost analysis. We also note that DOE has apparently obtained a previously unavailable DCAA audit for BNF's major subcontractor which should be considered.

<sup>7</sup>For example, DOE's adjustments to overhead, G&A, and travel alone accounted for [DELETED].

protester should submit its certified claim for protest costs directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.<sup>8</sup>

Comptroller General  
of the United States

---

<sup>8</sup>BNF also protests that Princeton failed to meet the RFP's local buy requirement. The applicable regulations authorize the SBA to determine whether an 8(a) concern satisfies this requirement and the SBA has confirmed that Princeton met it at the time proposals were submitted. Based on our review of the record, we find no basis to conclude that the SBA failed to follow applicable regulations or engaged in bad faith in determining Princeton satisfied this requirement.